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DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY

**NO. 47567-7-II**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**PROTERRA DEVELOPMENT VENTURES, LLC,**

**Plaintiffs/Appellant,**

**v.**

**FIRST AMERICAN TITLE INSURANCE CO., et al,**

**Defendants/Respondents**

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**APPEAL FROM THE SUPERIOR COURT**

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**THE HONORABLE SCOTT A. COLLIER**

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**APPELLANT'S RESPONSE BRIEF**

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## INTRODUCTION

First American Title (FATCO) argues that by carrying out the obligations of the Holdback agreement, it met its duties as fiduciary. It fails to appreciate that the holdback did not instruct FATCO to do anything, simply authorized it. It further fails to acknowledge that its employee directed the seller as to what the holdback should contain, thereby protecting only one party to the transaction. As such, summary judgment was not appropriate.

## ARGUMENT

### I. FATCO did not strictly comply with the Agreement.

Here, FATCO argues that it followed the agreement strictly (Reply Brief pages 1-13) by paying the funds which Mr. Kirschenbaum ordered. The plain language of the holdback simply authorizes a request for payment and does not direct it.

Comparing the language in the underlying escrow agreement (CP 20-25) and the Holdback is instructive.

Under the escrow agreement, funds are deposited with escrowee and “[y]ou are **instructed** to disburse said funds or pay out said funds when you have received the necessary conveying documents as required by this transaction ....”

By contrast, under the holdback agreement, there is no such mandatory language. As Kirschenbaum could merely authorize but not direct payment, then there is nothing that would have prevented FATCO in fulfilling its fiduciary duties from asking the buyer if the payments were, indeed related to final engineering.

Further, the “remaining funds” could only be made after final engineering was obtained as is clear in reading paragraphs 5 and 6 of the holdback together. In this case, the remaining funds were returned when final engineering had not been obtained.

An escrow officer has fiduciary duties of honesty, skill and diligence to both sides in the transaction. E.g. *National Bank v. Equity Investors*, 81 Wn. 2d 886 (1973).

There are genuine issues of material fact as to whether FATCO met its duties to the buyer.

## II. FATCO was negligent in advice on terms of the Holdback


It is clear that FATCO participated in the creation of the holdback. Indeed, the Reply itself quotes the file notes of the escrow officer [Reply at 16]. The notes indicate FATCO instructed the seller as to “the things FATCO would require in that [holdback] agreement. (CP 61). The inference, then is that the holdback agreement’s content was directed by

FATCO. In that regard, this case is indistinguishable from *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, , 675 P.2d 193 (1983) (escrow officer chose the wrong forms which did not protect one of the parties to a transaction and Consumer Protection Act liability **against** the escrowee was found as a matter of law in an equity skimming case). Holding the escrow officer to the duty of a reasonably prudent lawyer in the choice of the form in *Bowers* is not different than holding Ms. Snyder, the FATCO escrow officer, to the duty of a reasonably prudent lawyer. As the holdback clearly did not protect one of the parties to the transaction, it was error of the trial court to dismiss the buyer's claim on summary judgment.

#### CONCLUSION


The court erred in granting FATCO's motion for summary judgment inasmuch as there are genuine issues of material fact as to whether the fiduciary duties it owed plaintiff was met. The case should be reversed for trial. The fee award to FATCO should be vacated.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of October, 2015.



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**CERTIFICATE OF SERVICE**

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CERTIFICATE OF SERVICE

I hereby certify that I served Appellant's Response Brief on the following named person(s) on the date indicated below by mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below:

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